

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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CARLOS AUGUSTO LOPES,

Index No.: 07 CIV 5928

Plaintiff,  
-against-

**AFFIDAVIT IN SUPPORT  
OF WACHOVIA'S  
MOTION TO DISMISS**

MELLON INVESTOR SERVICES LLC, JP MORGAN  
CHASE & CO., WACHOVIA CORPORATION,  
WACHOVIA BANK, N.A., WACHOVIA/FIRST  
UNION BANK, HELENA BUSHROE, JOHN DOE  
AND JANE ROE,

Defendant.

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STATE OF GEORGIA )

ss:

COUNTY OF COBB )

TIM MERCK, being duly sworn, deposes and says:

1. I am a Vice President of Wachovia Bank, N.A., ("Wachovia"), also incorrectly sued herein as Wachovia Corporation and Wachovia /First Union Bank (hereinafter collectively referred to as "Wachovia"). I base this Affidavit upon my personal knowledge, upon documents maintained by Wachovia in the normal and ordinary course of business, upon plaintiff's Complaint, and upon the exhibits submitted by Wachovia on this motion.

2. I make this affidavit in support of Wachovia's motion for an order pursuant to Fed.R.Civ.P. 12(b)(6), dismissing the Complaint as against Wachovia.

**BACKGROUND**

3. Plaintiff sues Wachovia upon a check which was issued by the co-defendant Mellon Investor Services, LLC ("Mellon"), drawn upon co-defendant JP Morgan Chase Bank, N.A. ("Chase") and deposited at Wachovia. The Check was dated July 1, 2004, in the amount of

\$95,563.43 and was made payable to plaintiff Carlos A. Lopes (the "Check"). A true copy of the Check as produced by plaintiff is annexed hereto as Exhibit "1".

4. The Check bears an endorsement which plaintiff denies is his authorized endorsement. The Check was deposited at a Wachovia branch in Florida on July 27, 2004. The Check was thereafter sent through ordinary banking channels and was presented to and paid by defendant Chase as drawee bank. Wachovia does not retain any of the proceeds of the Check and the account into which the Check was deposited was closed prior to this suit being filed (this suit was filed almost three years after the check was deposited and paid).

5. Wachovia is a National Banking Association duly organized and existing under and by virtue of the laws of the United States. Wachovia maintains its principal place of business in the State of North Carolina. Wachovia maintains offices and transacts business in the State of New York, but no New York office or branch of Wachovia was involved in any transactions concerning the Check.

6. Plaintiff's Complaint (Exhibit "2") affirmatively asserts that plaintiff never received delivery of the Check. Plaintiff's Complaint also claims that the issuance of the Check, by defendant Mellon, was unauthorized and took place without plaintiff's knowledge, allegedly as a result of a fraud perpetrated by the individual defendant "Helena Bushroe", or by persons unknown. However, since plaintiff never received delivery of the Check, I submit he cannot maintain suit on it against Wachovia. (See, Wachovia's Memorandum of Law)

WHEREFORE, your deponent respectfully requests that this Court grant the instant motion of Wachovia pursuant to Fed.R.Civ.P. 12(b)(6) and dismiss plaintiff's Complaint as

against Wachovia, along with other appropriate relief under the circumstances.

  
TIM MERCK

Sworn to before me on this  
11 day of September, 2007

  
Notary Public

cs/Lopes.Aff  
09/07

